Nos. 77-241, 77-242, 77-243

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMUNICATIONS WORKERS OF AMERICA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

TELEPHONE COORDINATING COUNCIL TCC-1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ALLIANCE OF INDEPENDENT TELEPHONE UNIONS, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–29a) [1] is reported at 556 F. 2d 167. The opinion of

[1] "Pet. App." refers to the joint appendix filed by the three petitioners.

the district court (Pet. App. 35a–118a, 120a) is reported at 419 F. Supp. 1022. Prior opinions of the district court and the court of appeals on questions relating to intervention are reported at 365 F. Supp. 1105 and 506 F. 2d 735 respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1977 (Pet. App. 30a–31a), and rehearing was denied on May 16, 1977 (Pet. App. 32a–33a). The petitions for a writ of certiorari were filed on August 12, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in an action to enforce Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the court of appeals correctly held that the district court neither exceeded its authority nor abused its discretion in approving a consent decree (agreed to by the employer and the government enforcement agencies but objected to by the union intervenors) that included (a) goals for the employment of members of groups previously discriminated against, and (b) limited departures from collectively bargained promotion and transfer procedures.

STATEMENT

The petitions for certiorari involve challenges by intervening union defendants to a consent decree and supplemental order agreed to by the Department of

Labor, the Equal Employment Opportunity Commission, and the Department of Justice (hereinafter "government plaintiffs"), and the American Telephone and Telegraph Company (hereinafter "AT&T") on behalf of itself and twenty-four of its associated companies (hereinafter "Bell Companies"). The consent decree was entered by the district court on January 18, 1973, upon the institution of a civil action by the government plaintiffs charging that AT&T had engaged in a widespread pattern of discrimination in employment in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*; the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 201, *et seq.*; and Executive Order 11246, 30 Fed. Reg. 12319, as amended by Executive Order 11375, 32 Fed. Reg. 14303. The negotiations and proceedings culminating in agreement on and court approval of the consent decree are described in detail in the district court's opinion entered at an earlier stage of this litigation (365 F. Supp. 1105).

Under the consent decree, AT&T and its associated telephone companies agreed to implement an affimative action program designed to overcome the effects of past employment discrimination in the Bell System with respect to women, blacks, and other minorities (Pet. App. 5a). The pertinent provisions of the decree required AT&T to analyze its utilization of minorities and women in certain non-management job classifications. Where underutilization existed the Bell Companies were to establish corrective goals and

intermediate targets.[2] The provisions of the decree at issue here had a life of six years and are due to expire on January 17, 1979 (Pet. App. 8a–9a, 124a–125a, 140a).

Under the decree the Bell Companies were to evaluate candidates for promotion and transfer on the basis of applicable selection criteria established by existing collective bargaining agreements or pursuant to Bell System operating company practices (Pet. App. 126a–127a). In the Bell Companies, management makes all hiring decisions, and AT&T's policy has traditionally been that "management retains the prerogative to transfer and promote consistent with the needs of the business" (Pet. App. 59a). The relevant collective bargaining agreements establish no absolute entitlements based on seniority (*ibid.*). Among employees competing for promotion or transfer, "the standard calls for selection of the best qualified employee and for consideration of net credited service (company-wide seniority). Where qualifications are substantially equal, net credited service governs" (Pet. App. 60a).[3] To the extent that any company was unable to meet its intermediate targets using these cri-

[2] The decree also required a utilization analysis and the development of goals and intermediate targets to promote the full utilization of males in the operator and clerical classifications (Pet. App. 125a).

[3] Consistent with the collective bargaining agreements, the Bell Companies have always had the authority to fill vacancies in jobs above the entry level with new hires or with better qualified employees with low seniority, even though employees with high seniority might be by-passed (Pet. App. 60a, 195a).

teria, the decree required selections generally to be made from among basically qualified candidates in the group or groups for which the targets had not been met (Pet. App. 8a–9a, 124a–127a).[4] This requirement of limited departures from contractual criteria is referred to as the affirmative action override.

After the entry of the consent decree in 1973, petitioner Communications Workers of America (hereinafter "CWA") moved to intervene in the case as a party plaintiff. On CWA's appeal from the district court's denial of its motion, the court of appeals affirmed but also directed that CWA be permitted to intervene as a party defendant and seek modification of the consent decree insofar as it affects CWA's collective bargaining agreements with the Bell Companies (506 F.2d 735). Subsequently, the district court also granted petitioners Telephone Coordinating Council TCC–1, International Brotherhood of Electrical Workers (hereinafter "IBEW"), and Alliance of Independent Telephone Unions (hereinafter "Alliance"), leave to intervene as defendants (Pet. App. 40a).

Meanwhile, after the filing of a report on the implementation of the consent decree, the government plaintiffs and AT&T requested the district court to enter a supplemental order designed to remedy certain deficiencies in the achievement of intermediate targets and to assure future achievement of targets

[4] A somewhat different procedure applied to certain job classifications (see Pet. App. 125a–126a).

and goals (Pet. App. 9a–10a, 40a–41a). The pertinent provisions of this supplemental order established a procedure for unmet targets to be carried forward in certain establishments and job classifications (Pet. App. 145a–153a),[5] and further clarified the situations in which the affirmative action override was to be employed (Pet. App. 9a–10a, 54a–58a, 159a–160a). The explication of the affirmative action override (Pet. App. 159a) provided that, while contractual criteria for promotions would remain generally in effect,

> to the extent any Bell System operating company is unable to meet its intermediate targets in job classification[s] 5–15 using these criteria, the Decree requires that * * * selections be made from among any at least basically qualified candidates for promotion and hiring of the group or groups for which the target is not being met and in accordance with any applicable selection criteria in a collective bargaining agreement or pursuant to Bell System operating company practices as among such candidates.

Except as described above, the consent decree and supplemental order did not alter or affect the use of seniority as determined by collective bargaining agreements. All layoffs and recalls continued to be determined on the basis of net credited service according

[5] The carry-forward provisions did not enlarge the Bell Companies' total affirmative action obligations under the consent decree, nor did they extend the decree's life (Pet. App. 10a).

to the terms of those agreements, and no person hired or promoted pursuant to the affirmative action override received artifically increased seniority for any purpose. The consent decree further provided that vacancies created by layoffs and related work force adjustments would not be considered vacancies for purposes of transfer and promotion under the decree (Pet. App. 9a, 16a, 25a, 103a, 127a). The decree specifically permitted the Bell Companies and the collective bargaining representatives of their employees to negotiate alternatives to its provisions which would also effectuate compliance with federal law (Pet. App. 9a, 139a).

In proceedings before the district court, the petitioner unions both opposed the entry of the supplemental order and sought to modify the consent decree terms that provide for departures from the normal contractual standards for filling vacancies (Pet. App. 37a–38a). In a lengthy opinion, the district court rejected the intervenors' challenges and entered the supplemental order requested by the original parties (Pet. App. 35a–120a). The court of appeals affirmed (Pet. App. 1a–29a).

ARGUMENT

1. Petitioners request that this Court exercise its certiorari jurisdiction to review and modify the terms of a consent decree that is now more than four and one half years old and is due to expire in January 1979. The decree in question is the result of an extensive negotiation and conciliation process and the

careful exercise of discretion by the district court in rejecting petitioners' modification claims, and does not warrant further review. See *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 846–851 (C.A. 5), certiorari denied *sub nom. Harris* v. *Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944; *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity*, 514 F. 2d 767, 771–772(C.A. 2), certiorari denied *sub nom. Larkin* v. *Patterson*, 427 U.S. 911.

The consent decree challenged by petitioners was designed to resolve claims of employment discrimination against a corporation that employs more than 700,000 individuals in bargaining units represented by petitioners.[6] AT&T and the government plaintiffs, with the approval of the district court, chose to proceed by the "preferred means" of "[c]ooperation and voluntary compliance" rather than to engage in what would have been an enormous litigation. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. The terms of the decree, including limited departures from contractual criteria in order to meet corrective goals for the hiring and promotion of underutilized groups, were designed in accordance with prevailing law, and were intended to achieve the recognized Title VII objectives of equal employment opportunity and the most complete relief possible. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–430; *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 421.

Petitioners claim that the relief afforded by the decree would be precluded under this Court's recent

[6] See Pet. App. 42a, 45a, 49a.

decisions in *International Brotherhood of Teamsters* v. *United States*, Nos. 75–636 and 75–672, decided May 31, 1977; *United Air Lines, Inc.* v. *Evans*, No. 76–333, decided May 31, 1977; and *Trans World Airlines, Inc.* v. *Hardison*, Nos. 75–1126 and 75–1385, decided June 16, 1977. This decree was entered in January 1973, long before those decisions of last Term which in some respects departed from the law previously established in the courts of appeals regarding the protection afforded seniority systems by Title VII.

Nevertheless, as we show below (see pp. 13–18, *infra*), the terms of this decree are fully consistent with those decisions. The decree is sharply limited with respect to the instances in which, and the extent to which, relief might impinge upon the bargained for seniority expectations of AT&T employees. Any such impingement would occur only as an incidental effect of providing an adequate and administratively feasible remedy for an alleged (and uncontested)[7] far-reaching pattern of discrimination. The decree makes no attempt to restructure the entire seniority system in the fashion that this Court found objectionable in *Teamsters, supra.* Instead, the decree establishes flexible[8] goals and timetables that are intended to be met where possible by utilization of normal AT&T procedures for the selection and promotion of employees pursuant to collectively bargained agreements. The use of the affirmative action override

[7] See Pet. App. 8a, 61a–66a; CWA Pet. 5–6; IBEW Pet. 27; Alliance Pet. 17–18; AT&T Br. in Opp. 11 n. 13, 18.

[8] See Pet. App. 25a, 52a–57a, 80a, 112a–113a, 115a–116a, 124a–125a, 153a, 162a–164a.

is restricted to those situations where a particular work unit has not complied with its goals and timetables, and even then, its impact on individuals is exhausted when the initial job placement occurs. The override does not affect layoff or recall rights in any way. It does not award retroactive seniority to anyone, and its beneficiaries compete for future transfer or promotion pursuant to the procedures established by the company and the unions. The override is available only within the six-year period that has largely elapsed, and in a context where incumbents under collectively bargained agreements have never had absolute expectations (see Pet. App. 9a, 10a–12a, 16a, 25a, 59a–60a, 102a–104a).[9] As shown below, this carefully fashioned relief is an entirely proper use of the district court's equitable discretion under Title VII in the circumstances of this case.

Petitioners argue, however, that the awarding of benefits to some individuals who are not proven victims of discrimination pursuant to the affirmative action override impinges upon seniority rights in a manner not authorized by *Teamsters, supra,* and *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747. Even if that were true, petitioners present only abstract claims of injury.[10] As the court

[9] Indeed, both the district court (Pet. App. 60a) and the court of appeals (Pet. App. 11a) questioned the extent to which seniority rights were "the real dispute * * * [since] under the contracts [seniority] would only be determinative in cases of equal qualification."

[10] Petitioners attempt to make much of the fact that the affirmative action override was stated to have been utilized almost 29,000 times in the first two years of the decree's operation (Pet. App. 198a). See CWA Pet. 11–12, 15; IBEW Pet. 13, 20; Alliance Pet.

of appeals stated, "[n]o record was made in the district court, by the intervening defendants or anyone else, to establish whether there is a significant number of * * * persons" who would not be entitled to relief under petitioners' construction of the relevant legal standards (Pet. App. 18a). Just as the record fails to indicate how many non-victims obtained the benefit of the affirmative action override, it also does not indicate whether the award of retroactive seniority relief to actual victims—which is plainly authorized by *Teamsters* and *Franks, supra,*[11] but which was not provided here—would on balance work a greater or a lesser inroad upon existing seniority expectations than the limited one-time override available from the decree.

Although petitioners have presented only abstract claims of injury directed at a carefully limited affirm-

14. The significance of this number and its relationship to the number of victims of discrimination cannot be evaluated on the present record. "The Bell System is one of the largest employers in the United States" (Pet. App. 7a). The Bell Companies obviously make a very large number of employment decisions each year, and they had been subject to Title VII for almost 8 years when the consent decree was signed. 42 U.S.C. 2000e(b); Section 716(a) of the Civil Rights Act of 1964, 78 Stat. 266; Pet. App. 121a.

[11] Under *Teamsters*, every unsuccessful post-Act applicant for a position affected by discrimination would be at least presumptively entitled to relief, and in addition non-applicants would be given an opportunity to demonstrate that they should be treated as applicants. *Teamsters*, *supra*, slip op. 35–37. Under *Teamsters* and *Franks*, any employee or applicant for employment who was a post-Act discriminatee would potentially be entitled to retroactive seniority for purposes of layoff, recall, and future promotion. *Teamsters*, *supra*, slip op. 20–21; *Franks*, *supra*, 424 U.S. at 772–773.

ative action procedure, they argue that *Teamsters,* and the other Title VII cases freshly decided by this Court, require modification of the decree barely 14 months before it is set to expire. At least one petitioner (see IBEW Pet. 13) apparently contemplates the unwinding of thousands of hiring and promotion decisions made over the life of the decree,[12] and all petitioners apparently seek a restructuring of the decree to require determinations that any individual receiving its benefits is a proven victim of discriminatory action.

Modification of the decree at this late date would probably be inappropriate even if petitioners' view of the law were correct. As a practical matter, a restructuring of the decree could not be effected until well into the last months of the decree's life, and would be of little prospective significance.[13] Thus, whatever the merits of petitioners' claims that some terms of the 1973 decree would now be precluded by language in *Teamsters,* or would not henceforth be adopted in light of *Teamsters,* it would be improvident for this Court to undertake now to consider adjusting this four and one half year old consent decree to supervening developments in Title VII law.

In any event, as we show below, petitioners misapprehend the law. The provisions of the AT&T de-

[12] It is highly unlikely that any court would order the unraveling of personnel actions executed under compulsion of the court-approved consent order. Cf. *Teamsters, supra,* slip op. 48; *Patterson* v. *American Tobacco Co.,* 535 F. 2d 257, 267–270 (C.A. 4), certiorari denied *sub nom. Tobacco Workers' International Union* v. *Patterson,* 429 U.S. 920; *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F. 2d 980, 988 (C.A. 5), certiorari denied, 397 U.S. 919.

[13] Also, compare AT&T Br. in Opp. 8 n. 8 with note 10, *supra.*

cree are entirely consistent with Title VII and are independently supportable under Executive Order 11246.

2. Petitioners contend that the protection afforded seniority systems by this Court's decision in *International Brotherhood of Teamsters* v. *United States, supra,*[14] precludes any relief that impinges upon Bell System employee expectations that where qualifications for promotion and transfer are equal "net credited service governs" (Pet. App. 60a). This claim of broad immunity from Title VII relief is based upon a misapprehension of the questions decided in *Teamsters* and specifically fails to appreciate "[t]he difference between a remedy issue and a violation issue." *United Air Lines, Inc.* v. *Evans, supra,* slip op. 6.

In *Teamsters* this Court granted certiorari to review a court of appeals' decision that a seniority system violated Title VII because it perpetuated the effects of discrimination that had occurred both prior to and after the passage of the Act. The Court reversed, holding that under Section 703(h) of Title

[14] *United Airlines, Inc.* v. *Evans, supra,* and *Trans World Airlines, Inc.* v. *Hardison, supra,* do not provide any support for petitioners' contentions beyond that which they may otherwise derive from *Teamsters. Evans* was a private, non-class action raising a question of the timeliness of the charges which the plaintiff had filed with the EEOC as a precondition to her judicial action. In the case at bar, as in *Teamsters, supra,* slip op. 21 n. 30, "the Government has sued to remedy the post-Act discrimination directly, and there is no claim that any relief would be time-barred." *Hardison* involved the question of what constitutes unlawful religious discrimination under Section 703(a)(1) of Title VII, 42 U.S.C. 2000e–2(a)(1).

VII, 42 U.S.C. 2000e–2(h), a bona fide seniority system is not itself unlawful merely because it perpetuates the effects of prior discrimination, and that "the union's conduct in agreeing to and maintaining the system did not violate Title VII" (slip op. 29–30).

By contrast, the petitions here present only a remedy issue: whether the district court should have approved consent decree relief (for an uncontested pattern of post-Act discrimination) [15] when that relief allegedly impinges upon seniority expectations. *Teamsters* did not provide expanded insulation to seniority systems from this kind of Title VII relief, and did not depart from this Court's prior ruling in *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 761–762, that "[t]here is no indication * * * that § 703(h) was intended to modify or restrict relief otherwise appropriate" in a Title VII action "once an illegal discriminatory practice occurring after the effective date of the Act is proved." Thus, Section 703(h) does not alter the responsibility of the district courts to "'fashion the most complete relief possible'" and to "'fashion such relief as the particular circumstances of a case may require to effect restitution'" (*Teamsters, supra,* slip op. 38).

Any limitations upon the impact of appropriate Title VII relief on "the contractual rights of non-victim employees" must therefore be found, not in Section 703(h), but in the principles governing the

[15] See sources cited in note 7, *supra.*

exercise of equitable discretion in light of the pertinent statutory policies (*Teamsters, supra,* slip op. 48–49).[16] As detailed above, the parties to the decree engaged in a process of resolving claims of discrimination with respect to employment procedures that affected enormous numbers of employees. At the same time, they attempted to avoid unnecessary litigation that would be wasteful of private and public resources. The relief that was negotiated and then approved by the district court was a careful, limited and practical response to these concerns which has at most a limited impact upon seniority expectations. The affirmative action override is a last resort measure under the decree to achieve compliance with flexible goals and timetables; it does not affect layoff or recall rights, and it does not grant retroactive seniority or any competitive advantage for future transfer or promotion (see pp. 9–10, *supra*). Thus, although in particular instances the consent decree relief might disappoint the seniority-based expectations of AT&T employees, the court of appeals correctly held that the district court did not abuse its discretion in approving a decree that was responsive to "'the practical real-

[16] Petitioners' reliance on Section 703(a) of Title VII, 42 U.S.C. 2000e–2(a), as interpreted in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, is also misplaced. In holding that Section 703(a) prohibits discrimination against white persons, the Court in *McDonald* specifically noted that it was not considering the permissibility of affirmative action programs, whether imposed pursuant to a decree or otherwise. *Id.* at 280–281, n. 8.

ities and necessities inescapably involved in reconciling competing interests.'" *Teamsters, supra,* slip op. 48.

3. Petitioners also claim that Title VII as interpreted by *Teamsters* precludes a district court from establishing goals that may provide relief to persons who are not proven victims of discrimination. But the *Teamsters* opinion does not so state or intimate, and the question of the propriety of such goals was not before the Court in that case.[17] The *Teamsters* opinion discussed (slip op. 30–45), in the context of that case, the evidentiary burdens of parties contest-

[17] All petitioners cite footnote 61 of the Court's opinion in *Teamsters, supra,* slip op. 48, where the Court noted that Section 703(j), 42 U.S.C. 2000e–2(j), "provides only that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's workforce and the make-up of the population at large" (CWA Pet. 9; IBEW Pet. 25 n. 25; Alliance Pet. 20). The Court's discussion of Section 703(j) is fully consistent with the uniform conclusion of the courts of appeals that this provision precludes a finding of a violation of Title VII based solely on racial imbalance, but does not limit the courts' remedial authority once a violation has been properly established. *E.g., Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (C.A. 1), certiorari denied *sub nom. Director of Civil Service of Massachusetts* v. *Boston Chapter, N.A.A.C.P., Inc.*, 421 U.S. 910; *United States* v. *Wood, Wire and Metal Lathers International Union, Local Union No. 46*, 471 F 2d 408 (C.A. 2), certiorari denied, 412 U.S. 939; *United States* v. *Local Union No. 212, International Brotherhood of Electrical Workers*, 472 F. 2d 634 (C.A. 6); cf. *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 758, 761–762. "Any other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." *United States* v. *International Brotherhood of Electrical Workers, Local No. 38*, 428 F. 2d 144, 149–150 (C.A. 6), certiorari denied, 400 U.S. 943. In *Teamsters* itself the Court noted that numerical relief had been included in a partial consent decree which was not at issue. *Teamsters, supra*, slip op. 4 n. 4, 34 n. 47.

ing whether particular claimants were entitled to relief.[18] The Court did not purport to impose limits on a district court's authority in a different context to approve the relief balance struck by parties to a consent decree who seek by reasonable means to avoid burdensome litigation the only purpose of which would be to identify actual victims of discrimination.[19]

In any event, petitioners' contention is contrary to the "firm consensus in the courts of appeals" (Pet. App. 21a) upon the lawfulness of remedies involving numerical goals and timetables which may benefit persons who are not identified victims of discrimination.[20] It is also contrary to the intent of Congress, which rejected a Title VII limitation that would have prevented federal agencies from requiring employers to adopt "either fixed or variable numbers, propor-

[18] In *Teamsters* relief was sought only for actual or presumed victims of discrimination. This Court held that the court of appeals had been too generous in its presumptions of individual entitlement.

[19] See AT&T Br. in Opp. 13–14.

[20] *E.g., Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher* (C.A. 1), *supra; United States* v. *Wood, Wire and Metal Lathers International Union, Local Union No. 46* (C.A. 2), *supra; United States* v. *International Union of Elevator Constructors*, 538 F. 2d 1012 (C.A. 3); *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257 (C.A. 4), certiorari denied *sub nom. Tobacco Workers' International Union* v. *Patterson*, 429 U.S. 920; *Morrow* v. *Crisler*, 491 F. 2d 1053 (C.A. 5) (*en banc*), certiorari denied, 419 U.S. 895; *N.A.A.C.P.* v. *Allen*, 493 F. 2d 614 (C.A. 5); *United States* v. *Local Union No. 212, International Brotherhood of Electrical Workers* (C.A. 6), *supra*; *United States* v. *United Brotherhood of Carpenters and Joiners of America, Local 169*, 457 F. 2d 210 (C.A. 7), certiorari denied, 409 U.S. 851; *Carter* v. *Gallagher*, 452 F. 2d 315, 327 (C.A. 8) (*en banc*), certiorari denied, 406 U.S. 950; *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (C.A. 9), certiorari denied, 404 U.S. 984.

tions, percentages, quotas, goals or ranges" (118 Cong. Rec. 1662, 1676 (1972)).[21] See *United States* v. *International Union of Elevator Constructors,* 538 F. 2d 1012, 1019–1020 (C.A. 3). This Court has repeatedly declined to grant certiorari on this issue (*e.g., United States* v. *City of Chicago,* 549 F. 2d 415 (C.A. 7), certiorari denied *sub nom. Arado* v. *United States,* No. 76–1380, October 3, 1977; cases cited in notes 17, 20, *supra*). The decision in *Teamsters* does not address the issue, much less establish any new basis for challenging the use of employment goals. As the court of appeals correctly stated: "[t]he district court in framing a remedy could certainly balance the possibility that some [persons] who were not affected by the offending prior practices might be advantaged against the practicality that the decree had to be simple enough in operation to achieve its main purpose" (Pet. App. 18a).

[21] In opposing the amendment, Senator Javits relied upon and had printed in the Congressional Record two decisions: *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854, approving such relief under Executive Order 11246, and *United States* v. *Ironworkers Local 86, supra,* approving such relief under Title VII. 118 Cong. Rec. 1665–1675 (1972). He noted that the amendment would not only destroy the concept of affirmative action under the Executive Order, but would also "deprive the courts of the opportunity to order affirmative action under title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination." 118 Cong. Rec. 1665 (1972).

The ruling in *Teamsters, supra,* slip op. 27 n. 39, that the views of a later Congress should be given little weight in interpreting a provision enacted in 1964, does not pertain here, since in 1972 the remedial provision of Section 706(g), 42 U.S.C. (Supp. V) 2000e–5(g), was amended and expanded by the addition of the words "or any other equitable relief as the court deems appropriate."

4. Further judicial consideration of the purported conflict between *Teamsters* and the relief provided by the consent decree on Title VII grounds is not warranted in any event because the decree is independently supportable on the authority of Executive Order 11246, concerning which petitioners assert no conflict with any decision of this Court and no conflict among the courts of appeals (Pet. App. 16a–17a, 61a, 81a–83a, 86a–87a). By its terms, the Executive Order requires that government contractors agree that they "will not discriminate against any employee or applicant for employment because of race" (Section 202), and authorizes (Section 209(a)(2)) "appropriate proceedings [to] be brought to enforce those provisions." Executive Order 11246 imposes upon government contractors an independent obligation above and beyond that imposed by Title VII not only to refrain from discriminatory practices, but also to take affirmative action to ensure that their employees are treated without discrimination in employment. The courts that have considered the question have uniformly found the Executive Order to be an independent basis for government enforcement actions.[22]

[22] *United States* v. *New Orleans Public Service, Inc.,* 553 F. 2d 459, 465–468 (C.A. 5), petition for a writ of certiorari pending, No. 77–497; see also *Rossetti Contracting Co., Inc.* v. *Brennan,* 508 F. 2d 1039, 1045 n. 18 (C.A. 7); *Northeast Construction Co.* v. *Romney,* 485 F. 2d 752, 760–761 (C.A. D.C.). "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 47–50. See 110 Cong. Rec. 13650–13652 (1964).

The obligations imposed upon federal contractors under Executive Order 11246 are greater than those imposed on employers generally under Title VII. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (C.A. 3), certiorari denied, 404 U.S. 854; *Southern Illinois Builders Ass'n* v. *Ogilvie,* 327 F. Supp. 1154 (S.D. Ill.), affirmed, 471 F.2d 680 (C.A. 7). And, significantly, the Executive Order contains no provision analogous to Section 703(h) of Title VII, which petitioners have urged as the primary basis for limiting relief that affects seniority systems. Moreover, Congress has specifically indicated its approval of the use of the Executive Order to require affirmative action remedies, including numerical goals and timetables (see 118 Cong. Rec. 1662–1676, 4917–4918 (1972); see also Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 723, 753–757 (1972)) and rejected an amendment that would have made Section 703(j) of Title VII applicable to the Secretary of Labor's enforcement of the Executive Order (see 118 Cong. Rec. 4917–4918 (1972)). As the court of appeals below stated in sustaining the consent decree, "the Executive Order [is] a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors * * * [T]hat broader governmental interest is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination" (Pet. App. 16a–17a).

There is no conflict among the courts of appeals concerning the foregoing principles, nor is there any disagreement among the district courts concerning their application in the context presented here. The granting of certiorari to consider the Executive Order questions urged by petitioners is therefore not warranted, and the presence of this independent ground for sustaining the decree also makes review by this Court of petitioners' Title VII claims inappropriate.

5. Petitioners' remaining arguments concerning the constitutional validity of an equitable remedy that includes flexible goals and timetables of limited duration have consistently been rejected by the lower courts, and this Court has consistently declined to review those decisions.[23] All of the courts of appeals that have considered the issue have agreed that such relief is within the constitutional as well as the statutory authority of the district courts, and that a decision to impose or approve such relief will not be disturbed in the absence of an abuse of discretion.[24] Petitioners have cited no decision of this Court [25] or of any court

[23] *E.g.*, cases cited in notes 17, 20, *supra.*

[24] *Ibid.*

[25] Neither *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, nor *H. K. Porter Co., Inc.*, v. *National Labor Relations Board*, 397 U.S. 99, involved any question concerning the permissibility of remedial goals and timetables.

of appeals [26] to the contrary, and have identified no particular abuse of discretion by the district court in approving the decree in this case. As the district court stated (Pet. App. 103a–104a):

[26] In *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 428, rehearing denied, 531 F. 2d 5 (C.A. 2), certiorari denied, 429 U.S. 823, the Second Circuit approved interim numerical relief, but disapproved permanent numerical relief "[i]n view of the limited scope of the issues framed in this class action and the paucity of the proof concerning past discrimination." The relief at issue here is of limited duration, and is assumedly based upon a long history of past discrimination.

In *Equal Employment Opportunity Commission* v. *Local 638 . . . Local 28 of Sheet Metal Workers' International Association*, 532 F. 2d 821 (C.A. 2), a panel of the Second Circuit unanimously (a) approved the imposition of numerical goals for union membership and apprenticeship program participation, and (b) disapproved an order to replace one union representative on the joint apprenticeship committee with a minority member. The panel also disapproved by a divided vote the utilization of ratios for apprentice selection to the extent that this would conflict with the utilization of scores on non-discriminatory, validated job-related tests. The judge who cast the deciding vote on the latter issue disagreed with the legal reasoning relied upon here by the IBEW petitioners (see IBEW Pet. 21). Compare 532 F. 2d at 831–832 with *id.* at 833–834. The present case does not involve the kind of "bumping" which was unanimously disapproved in *Local 28*, nor do petitioners here complain of any alleged interference with the use of validated testing procedures.

Chance v. *Board of Examiners*, 534 F. 2d 993, modified, 534 F. 2d 1007 (C.A. 2), is also inapposite here because it involved "bumping"; the affirmative action override in the present case does not affect layoff or recall rights in any way.

This Court's review in the present case is not warranted to resolve any disagreement that may exist with regard to legal theory within the Second Circuit. The Second Circuit has approved numerical relief in a case that is much closer on its facts to the present case than *Kirkland*, *Local 28*, or *Chance*. See *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity*, 514 F. 2d 767 (C.A. 2), certiorari denied *sub nom. Larkin* v. *Patterson*, 427 U.S. 911.

> the goals and timetables the override is designed to achieve were arrived at by a process that was careful rather than casual, thorough rather than superficial, and reasonable rather than arbitrary. * * * Those goals and timetables are clearly permissible under Title VII; the use of a limited and carefully fashioned remedy to achieve them in a timely manner is likewise permissible, and in no way exceeds the broad remedial power conferred on the federal courts * * *.[27]

6. Because the district court retains continuing jurisdiction over the consent decree in this case, it always remains available as a forum in which peti-

[27] Petitioner IBEW advances the additional contention that the lower courts' approval of the consent decree and supplemental order was inconsistent with the unions' collective bargaining rights under the National Labor Relations Act (see IBEW Pet. 26–31). But the unions' right "to negotiate alternatives to the provisions of [the] Decree which would also be in compliance with Federal law" is fully preserved by the consent decree itself (Pet. App. 139a). Moreover, the unions have intervened as parties and their views have been heard in this case. They "were permitted a full opportunity to convince the court that the relief AT&T had agreed to went beyond that required to remedy the violation. The posture of the case * * * is, for all practical purposes, that of a fully litigated decree" (Pet. App. 13a–14a). Unlike the situation in *Myers* v. *Gilman Paper Corp.*, 544 F. 2d 837, modified and rehearing denied, 556 F. 2d 758 (C.A. 5), there was no collectively bargained and agreed to Title VII remedy in the present case for the district court to consider as an alternative to the consent decree.

tioners may press claims that recently decided cases regarding Title VII, the Executive Order, or the Constitution have effected a change in law justifying a modification of the decree. If the courts should in the future determine that relief such as that afforded by the decree is improper, there would be no doubt of the district court's authority to afford appropriate relief, upon a finding that "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). Compare *System Federation No. 91, Railway Employees' Department* v. *Wright,* 364 U.S. 642, 651–653; *Jordan* v. *School District of City of Erie, Pennsylvania,* 548 F. 2d 117, 122 (C.A. 3) with *United States* v. *Swift & Co.,* 286 U.S. 106, 114–115, 117; *Lubben* v. *Selective Service System Local Board No. 27,* 453 F.2d 645, 651 (C.A. 1). The district court is the appropriate forum for such claims since it has the capability of curing deficiencies in the factual record such as those that make petitioners' present claims so abstract, and because the district court must in any case exercise its equitable discretion in deciding what kinds of alterations, if any, would be appropriate at this late date in the life of the decree.[28] The continuing jurisdiction of the district court thus provides an available forum for claims that developing law requires modification of the decree, and presents an additional reason why review by this Court is not warranted.

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[28] See *United States* v. *Allegheny-Ludlum Industries, Inc.,* 517 F. 2d 826, 846–851 (C.A. 5), certiorari denied *sub nom. Harris* v. *Allegheny-Ludlum Industries, Inc.,* 425 U.S. 944; *Patterson* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity,* 514 F. 2d 767, 771–772 (C.A. 2), certiorari denied *sub nom. Larkin* v. *Patterson,* 427 U.S. 911.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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